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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. & T. TERMINAL PACKAGING CO., INC., and ANTHONY SPINALE,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Third Circuit

BRIEF *AMICI CURIAE* OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
I. INTEREST OF *AMICI CURIAE*	1
II. SUMMARY OF ARGUMENT	2
III. ARGUMENT—REASONS FOR GRANTING THE WRIT	3
A. The Decision Below Injures Every Shipper in the Country	3
B. The Decision Below Erred in Concluding that Common Law Remedies Against Exempt Railroads are Preempted	9
C. The Decision Below Erred in Concluding that Rate Surcharges to Offset or Deter Loss and Damage Claims are Lawful	13
IV. CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Brae Corp. v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985) 7

Coal Exporters Ass'n v. *United States*, 745 F.2d 76 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985) 7

Co-operative Shippers Inc. v. *Atchison, T. & S. F. Ry.*, 613 F. Supp. 788 (N.D. Ill. 1985), *rev'd*, No. 86-1075 (7th Cir. Feb. 10, 1988) 5, 15

Deiro v. *American Airlines, Inc.*, 816 F.2d 1360 (9th Cir. 1987) 11

First Pennsylvania Bank v. *Eastern Airlines, Inc.*, 731 F.2d 1113 (3d Cir. 1984) 5, 11

Fruitco Corp. v. *Consolidated Rail Corp.*, 462 NYS 2d 754 (N.Y. Civ. Ct. 1983) 15

Harborlite Corp. v. *ICC*, 613 F.2d 1088 (D.C. Cir. 1979) 12

Quasar Co. v. *Atchison, T. & S. F. Ry.*, 632 F. Supp. 1106 (N.D. Ill. 1986) 11

State of New York v. *United States*, 331 U.S. 284 (1947) 12

Texas & Pacific Ry Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 9, 10

Transcontinental Gas Pipe Line Co. v. *State Oil & Gas Board*, 474 U.S. 409 (1986) 9, 10

Yamazen USA v. *Chicago and Northwestern Transportation Co.*, 790 F.2d 621 (7th Cir. 1986) 16

ADMINISTRATIVE DECISIONS:

Consolidated Rail Corporation - Declaratory Order - Exemption, 1 ICC 2d 895 (1987) 3, 6, 9

Ex Parte No. 230 (Sub-No. 5), 46 Fed. Reg. 32257 (June 22, 1981) 16

Exemption from Regulation - Rail Transportation Frozen Food, 367 ICC 859 (1983) 8

Rail General Exemption Authority - Fresh Fruits and Vegetables, 361 ICC 211 (1979) 9

Rail General Exemption Authority - Miscellaneous Commodities, 45 Fed. Reg. 20484 (March 28, 1980) ... 4

Rail General Exemption Authority - Miscellaneous Agricultural Commodities, 367 ICC 298 (1983) 8, 9

Rail General Exemption Authority - Miscellaneous Manufactured Commodities, 53 Fed. Reg. 3900 (Feb. 10, 1988) 8

Table of Authorities Continued

Page

STATUTES:
49 USC § 10103 (1982) 10
49 USC § 10501(d) (1982) 10
49 USC § 10505 (1982) ..... *passim*
49 USC § 11707 (1982) 5, 16

BRIEF *AMICI CURIAE* OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

INTEREST OF *AMICI CURIAE*

Amicus National Small Shipments Traffic Conference, Inc., includes among its members individuals, small companies and major corporations. Conference members ship millions of pounds of freight each year by railroads and motor carriers. *Amicus* Drug and Toilet Peparation Traffic Conference, Inc., includes most major manufacturers of drugs, medicines and toiletries, as well as many smaller companies, all of whom participate in conference activities in their capacities as shippers of freight by railroad and motor carrier. Hereinafter, *Amici* will be referred to as "Shipper Conferences".

Both Shipper Conferences are non-profit membership corporations, and both have been very active for many years in representing their members' interests in transportation issues that arise before Congress and state legislatures, regulatory agencies (in particular, proceedings before the Interstate Commerce Commission), and courts. The Shipper Conferences participated as *amici* below in the U.S. Court of Appeals for the Third Circuit, as well as in the summary judgment proceedings in District Court.

As shippers using exempt transportation services, members of these Shipper Conferences will be exposed to the same denial of any effective remedy for carrier abuses of market power or violations of legal responsibilities as that suffered by Petitioners in this case. Because of the importance of the issues raised in this case and because

the decision below must not be sustained, *Amici* Shipper Conferences urge this Court to grant the petition for a writ of certiorari and to reverse the decision of the Court of Appeals below.

II.

SUMMARY OF ARGUMENT

The number of shippers whose rail freight moves under an exemption order issued by the ICC under 49 USC § 10505 has grown rapidly in recent years, to the point where shippers using regulated rail service are becoming, if they have not already become, a distinct minority. Because of this enormous expansion in the scope of exempt rail transportation service, the decision of the Third Circuit below, holding that exempt railroads are not subject to common law remedies and that they may offset or deter shipper loss and damage claims through individual rate surcharges, is an extremely important one. In so holding, the court reduces shipper remedies against exempt railroads to the vanishing point.

On the issue of the availability of common law remedies, the Third Circuit makes new law. The court relies on past cases finding common law remedies preempted where there are regulatory remedies before the agency, but expands those precedents to cover a situation in which there is no current agency remedy for the violations which took place and only a limited chance for a prospective remedy. The court also relies on cases holding state regulatory remedies preempted by Congressional deregulation, but expands those precedents to cover a situation in which state regulation is not at issue, the deregulation is by an agency, and the governing statute expressly preserves common law remedies. The result of

the Third Circuit's holding is to expose shippers to irreparable injury at the hands of exempt railroads.

On the issue of railroad rate surcharges to offset or deter shipper loss and damage claims, the Third Circuit's decision, which rests on the merits of the legal question rather than on preemption grounds, effectively ends railroads' historic responsibility as common carriers for the safety of shippers' freight, and renders nugatory Congress' express statutory preservation of loss and damage liability for exempt railroads.

III.

ARGUMENT—REASONS FOR GRANTING THE WRIT

A. The Decision Below Injures Every Shipper in the Country.

At issue in this case are two fundamental questions of enormous importance to the Nation's shippers who depend on exempt rail transportation: whether such shippers have any meaningful remedies in the event of abuses of market power or violations of legal responsibilities by railroads providing transportation service under an exemption granted by the Interstate Commerce Commission, and whether such railroads have any meaningful liability for loss or damage to the freight entrusted to their care. The exemption in question has been defended by the ICC[1] and the Third Circuit[2] as "not needed to protect shippers from an abuse of market power" (49 USC

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[1] ICC Docket No. 40045, *Consolidated Rail Corporation-Declaratory Order-Exemption*, 1 ICC 2d 895 (1987), Petitioners' Appendix G, pp. 142a, *et seq.* (hereinafter *Conrail Exemption Decision*).

[2] *G&T Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F2d 1230, 1235 (3d Cir. 1987), Petitioners' Appendix A (hereinafter *G&T Terminal*).

§ 10505(a)(2)(B)). However, it would be difficult to imagine a more egregious abuse of market power, or a clearer violation of the statutory obligations which Congress preserved for exempt railroads, than this case presents.

Petitioners G&T Terminal Packaging Co., Inc. and Anthony Spinale, G&T's President (hereinafter "G&T") ship Idaho and other western potatoes thousands of miles by rail to New Jersey, where they are delivered by Consolidated Rail Corporation ("Conrail"), the only railroad serving G &T. Because of the absence of rail competition, the infeasiblity of using trucks for such long movements of such a high-bulk, low value commodity, and the impossibility of substituting locally-grown potatoes for the Idaho variety in G&T's business, G&T is effectively captive to Conrail.[3]

Conrail transports G&T's potatoes pursuant to an exemption issued by the ICC. The validity of the Commission's original decision exempting from regulation the rail transportation of potatoes (among other commodities) is not challenged.[4] However, 49 USC § 10505, the section of

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[3] *See* G&T's Petition for Writ of Certiorari, at 12-13.

[4] Ex Parte No. 436 (Sub-No. 2), *Rail General Exemption Authority-Miscellaneous Commodities*, 45 Fed. Reg. 20484 (March 28, 1980). Although this exemption predated the October 1, 1980 effective date for the Staggers Rail Act of 1980, Pub.L. 96-448, 94 Stat. 1895, there are indications in the legislative history of that Act that its provisions on exemptions were intended to apply to earlier exemption orders of the ICC. See the discussion by Representatives Matsui and Florio, 126 Cong. Rec. H8582 (1980):

> *Mr. Matsui:* I have one other colloquy, if I may. This pertains to section 314, subparagraph (e). As the chairman and ranking minority member know, the ICC cannot exempt a carrier from certain liability standards under this section; however, on page 60 of the report language it states that the amendment applies

the Interstate Commerce Act dealing with exemptions, essentially preserves the railroads' "Carmack Amendment" liability for loss or damage to shippers' freight, even after an exemption order has been issued. 49 USC § 10505(e).[5]

G&T filed certain claims with Conrail for loss and damage to its freight. In so doing, it was exercising a right of shippers that existed before railroads were regulated, continued while they were regulated, and has been maintained by Congress even after exemption. Conrail refused to pay, and G&T brought various court actions, which Conrail is currently defending. Not content with its right to avoid liability if it is able to mount a successful defense to G&T's loss and damage actions, Conrail evidently decided to teach G&T (and possibly other captive shippers, by example) a lesson. Notwithstanding the statutory loss and damage provisions of 49 USC § 10505(e),

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prospectively. It uses the phrase "prospective change".

It is my understanding that this section applies to exemption orders issued before enactment of this legislation. Is this, in fact, correct?

Mr. Florio: That is correct, as well.

In the proceedings below it has been assumed that the potato exemption is governed by 49 USC § 10505 as amended by the Staggers Act, and *Amici* Shipper Conferences share that view.

[5] The Carmack Amendment, former 49 USC § 20(11), is now codified at 49 USC § 11707. It embodies the common law rule of full carrier liability for freight loss and damage, and provides that actions to recover on loss and damage claims not paid by the carrier shall be brought in the U.S. District Courts or State Courts. For a discussion of the history of carrier loss and damage liability, from common law days through the Staggers Act, see *Co-operative Shippers, Inc.* v. *Atchison, T & S.F. Ry.*, 613 F. Supp. 788, 789-91 (N.D. Ill. 1985), *rev'd on other grounds*, No. 86-1075 (7th Cir. Feb. 10, 1988). See also *First Pennsylvania Bank* v. *Eastern Airlines, Inc.*, 731 F.2d 1113 (3d Cir. 1984).

Conrail retaliated against G&T by publishing a surcharge applicable to G&T's freight alone of $500 to $600 per car. With such an arrangement, Conrail cannot lose. If Conrail is found liable for loss or damage to G&T's potatoes, it can recover through its discriminatory surcharges any damages awarded G&T.[6] When G&T protested, Conrail informed it that the surcharge would be substantially eliminated if G&T would agree not to file any more claims.[7]

G&T subsequently brought the action that underlies its Petition to this Court. As relevant to the case at this stage, G&T sought to challenge Conrail's surcharge as unlawful discrimination in violation of the common law (the statutory prohibition against discrimination having been rendered ineffective by the Commission's exemption order), or, alternatively, to challenge the surcharge as a violation of 49 USC § 10505(e), which preserves exempt railroads' Carmack Amendment liability.[8]

In its *G&T Terminal* decision, the Third Circuit majority held, over a vigorous dissent by Judge Aldisert, that G&T's common law discrimination claim was preempted

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[6] Indeed, it is not clear that Conrail's recovery would have to stop at the level of G&T's damages. As will be seen, G&T might also find itself paying Conrail's legal fees, even if Conrail loses the court cases.

[7] G&T Petition, at 7. Conrail has denied that its surcharge was in retaliation for G&T's assertion of its right to have its freight delivered intact and in good condition, but this case involves the appeal of summary judgment rulings against G&T, and G&T's contentions must be accepted as true. See *G&T Terminal*, 830 F.2d at 1233-34.

[8] G&T's decision to seek relief in court was based in large part on advice from the Director of the ICC's Office of Proceedings to the effect that the ICC lacked jurisdiction over G&T's issues. This advice was subsequently reversed by the Commission itself, in the *Conrail Exemption Decision*, after G&T's court action was under way.

by federal law, and would have to be raised before the ICC, if and when that agency could be persuaded to revoke, in whole or in part, its potato exemption. G&T's charges of violation by Conrail of 49 USC § 10505(e) were dismissed too, but not on preemption grounds. The court held, on the merits, that Conrail's retaliatory surcharge to deter loss and damage claims does not violate federal law.

As is explained in more detail in the sections of this brief that follow, the first of these holdings opens the door to irreparable abuses of market power by railroads; the second writes Section 10505(e) out of the Act, and effectively terminates a centuries-old requirement that carriers face liability for loss or damage to the goods of the public entrusted to them for transportation.

At the outset *Amici* wish to impress on the Court the broad reach of the Third Circuit's holding. Since Section 10505 was added to the Interstate Commerce Act in 1976, the Commission has used the exemption power there provided to remove ever larger segments of rail transportation from regulation. Many shippers, some courts, and even some Commissioners have regarded the Commission's zeal to deregulate through exemptions as excessive.[9]

The Commission has now exempted most agricultural commodities, with grain and soybeans the main excep-

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[9] See *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985), in which the court affirmed in part, and reversed in part, the ICC's decision exempting all rail transportation in boxcars. See also *Coal Exporters Ass'n* v. *United States*, 745 F.2d 76 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985), vacating the Commission's decision to exempt all export coal movements. There were dissents to the Commission decisions in both cases. 367 ICC at 599 and at 777.

tions,[10] and all rail transportation of frozen foods.[11] Very recently, in a decision served February 9, 1988 in ICC Docket No. 346 (Sub-No. 24), *Rail General Exemption Authority—Miscellaneous Manufactured Commodities*, the Commission has proposed, apparently *sua sponte* and over the dissent of Commissioner Simmons, to exempt the rail transportation of most manufactured commodities, and has requested comments on its proposal.[12]

Amici Shipper Conferences cite these instances (which do not constitute a complete list of ICC exemptions) not to challenge the Commission's use of its exemption authority. This is not the place for such a challenge. However, it should be apparent that the time is coming, if it has not already arrived, when the number of rail shippers served under ICC exemption orders far exceeds the number of rail shippers served subject to regulation.

The facts of this case would warrant review on a writ of certiorari even if this case had no significance beyond a single potato shipper injured by an abusive monopoly railroad. But there is nothing in the decisions below to limit the challenged holdings to G&T, or even to shippers under the potato exemption.[13] To the contrary, the Third

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[10] *Rail General Exemption Authority—Miscellaneous Agricultural Commodities*, 367 ICC 298 (1983).

[11] *Exemption from Regulation—Rail Transportation Frozen Food*, 367 ICC 859 (1983).

[12] A brief summary of the Commission's full unpublished decision was published in the Federal Register at 53 Fed. Reg. 3900 (February 10, 1988).

[13] Not only do the decisions below not rest on any features unique to G&T or potato shippers, but there was considerable confusion as to the applicable exemption. Judge Ackerman appears (see Petitioners' Appendix at 100a) to attribute the exemption to *Rail General*

Circuit's holdings are likely to affect every shipper using any exempt rail transportation service. In view of the fact that this category of shippers is likely to include almost every shipper in the country, the decision below is one of enormous importance, meriting careful review by this Court. For the reasons explained in the next sections of this brief, that decision cannot be sustained.

B. The Decision Below Erred in Concluding that Common Law Remedies Against Exempt Railroads are Preempted.

The Third Circuit majority in *G&T Terminal* rejected G&T's common law discrimination claims largely on the strength of two cases: *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and *Transcontinental Gas Pipe Line Co.* v. *State Oil & Gas Board*, 474 U.S. 409 (1986). The majority's legal analysis cannot withstand scrutiny.

In the *Abilene Cotton Oil* case, this Court, after observing that repeals by implication are not favored and that a statute will not be construed as taking away common law rights unless survival of such rights would negate the statute (204 U.S. at 437), held that common law remedies duplicative of remedies before the ICC were preempted. The problem with applying the *Abilene Cotton Oil* rule to the *G&T* case is that it equates remedies

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Exemption Authority—Fresh Fruits and Vegetables, 361 ICC 211 (1979), but see 361 ICC at 217-18, n.6, where the Commission notes that a potato exemption is being considered elsewhere. In its *Conrail Exemption Decision* (Petitioners' Appendix at 144a-145a), the Commission attributes the potato exemption to *Rail General Exemption —Miscellaneous Agricultural Commodities*, 367 ICC 298 (1983), but see 367 ICC at 308, where the Commission observes that potatoes had already been exempted.

before the ICC against a regulated railroad, which obviate the need for common law remedies, with remedies before the ICC against an exempt railroad, which clearly do not. Moreover, in enlarging the rule of *Abilene Cotton Oil* into a rule against the continued vitality of common law remedies against deregulated as well as regulated carriers, the Third Circuit fails to deal adequately with 49 USC § 10103.[14]

In the *Transcontinental Gas Pipe Line* case, the Court concluded that there was no implied Congressional intent to allow state regulation to fill the gap left by federal deregulation of certain kinds of gas sales. The problem with applying *Transcontinental Gas Pipe Line* to the G&T case is that no attempt has been made by G&T to invoke state regulatory remedies. The Third Circuit is thus not applying the rule of that case, but expanding it to cover federal common law, in addition to state regulation, and it is taking this step in the context of Commission, rather than Congressional, deregulation, under a statute which expressly preserves "remedies existing . . . at common law."

The Third Circuit does not ignore 49 USC § 10103, but it regards that section as repealed by 49 USC § 10501(d), which provides for exclusive ICC jurisdiction. 830 F.2d at 1234. However, the natural reading of this section, and the reading that is consistent with the rule against implied abrogation of common law remedies, is that Commission jurisdiction preempts common law remedies only so long as that jurisdiction is exercised, rendering common law remedies unnecessary, but not when that jurisdiction is

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[14] Section 10103 states: "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

surrendered. The Third Circuit's interpretation leaves a wide-open gap in legal remedies for acts illegal at common law.

The Third Circuit adverts to policy reasons for finding common law remedies unavailable, suggesting that allowing such remedies to survive could lead to conflicts with ICC regulation or to a lack of uniformity from state to state. But those concerns are not well founded. As Judge Aldisert points out in his dissent (830 F.2d at 1239-40), there is no conflict between common law remedies and ICC regulation so long as the former are limited to periods when ICC jurisdiction is inactive due to an exemption. And a federal common law on discrimination by exempt railroads is no more susceptible to lack of uniformity than federal common law as to loss and damage claims. See *First Pennsylvania Bank, supra.* See also *Quasar Co.* v. *Atchison, T.& S.F. Ry.*, 632 F. Supp. 1106, 1112-13 (N.D. Ill. 1986) ("when a question of the liability of a carrier falls outside statutory coverage, rather than leave the shipper without a remedy courts have turned to federal common law"), and *Deiro* v. *American Airlines, Inc.*, 816 F.2d 1360, 1365 (9th Cir. (1987), discussing the "federal common law governing common carriers."

If anything, policy considerations (like legal considerations) militate in favor of retention of common law remedies as a check on the otherwise uncontrolled behavior of exempt railroads. The result of the Third Circuit's decision is to deny relief to a shipper with a well-pleaded (and presumptively true, on summary judgment) case of discrimination. G&T's only hope for *any* relief on its discrimination claim is to commence an exemption revocation proceeding at the ICC, and hope it can prevail. If the ICC decides to revoke the exemption in part and restore its jurisdiction over Conrail potato service to

G&T, G&T must then try to win a discrimination case.[15] Even if successful in these proceedings, which could easily take years, G&T would never be made whole for injuries suffered during the period of the exemption.[16]

This Court stated in *New York* v. *United States*, 331 U.S. 284, 296 (1947): "The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." Discrimination is a serious matter to shippers in competitive markets. Even a brief period in which competitors are favored with lower cost service can produce irreparable injury, and an extended period of discrimination for a rail captive shipper can lead to bankruptcy. It is anomalous that under the Interstate Commerce Act (which expressly preserves common law remedies) a shipper like G&T can be told that it has no remedy against discrimination other than to leave Idaho potatoes to its competitors.

It must also be recognized that the Third Circuit's holding is not limited to G&T, or for that matter to discrimination. With one exception—loss and damage liability, which was also largely wiped out by the Third Circuit— an exemption decision under 49 USC § 10505 eliminates all statutory controls over a railroad's dealings with its shippers. If all common law remedies are also

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[15] For a discussion of the difficulties facing G&T in such a proceeding, see *Harborlite Corp.* v. *ICC*, 613 F.2d 1088 (D.C. Cir. 1979).

[16] See Judge Aldisert's dissent, 830 F.2d at 1239. The Third Circuit majority's response to Judge Aldisert's concern that G&T would be left with no remedy was to say (803 F.2d at 1235-36): "The shippers' remedy for price discrimination is simple: it can choose other means of transportation." For a New Jersey seller of Idaho potatoes served by a single railroad, the court's solution is a variant of "Let them eat cake."

eliminated, an exempt ralroad can do whatever it likes, not just as to rates, but also as to service. Indeed, there would be nothing to prevent a railroad from refusing to serve a shipper at all.[17] It is a rare rail dependent shipper that can survive a total embargo for long enough to pursue an exemption revocation proceeding, the sole remedy left under the Third Circuit's rule in *G&T Terminal Co.* The Third Circuit's holding that all common law remedies are preempted as to an exempt railroad is bad law and bad policy.

C. The Decision Below Erred in Concluding that Rate Surcharges to Offset or Deter Loss and Damage Claims are Lawful.

Most of the attention of the parties and the courts below was devoted to the question of whether common law remedies against an exempt railroad are preempted under federal law. However, the Third Circuit also addressed G&T's contention that, in using rate surcharges to deter G&T from filing and pursuing its claims against Conrail for loss and damage to freight in transit, Conrail was violating 49 U.S.C. § 10505(e), which preserves even an exempt railroad's Carmack Amendment liability. The Third Circuit's holding on this issue is, in some respects, even more damaging to shippers than its holding on G&T's common law claims, and even more far-reaching in its significance.

At the District Court level, Judge Ackerman appeared to dispose of G&T's case on this issue on preemption

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[17] In fact, it appears that Conrail considered just such a solution to its problems with G&T. See Petition for Writ of Certiorari at 14. If G&T succeeded in having the ICC lift its exemption to the extent necessary to address G&T's discrimination claims, Conrail might still be able to pursue other avenues of retaliation.

grounds, as merely another form of G&T's discrimination case. Judge Ackerman stated (Petitioners' Appendix at 87a):

> Plaintiffs' attempt to restore this aspect of the original complaint essentially does nothing more than raise the same charge of discriminatory rates against Conrail alleged in its common law claim. As explained earlier in this opinion, Conrail's ability to drive up G&T's rates without fear of losing G&T's business to a competitor is evidence of something amiss in the deregulatory scheme envisioned by Congress and the ICC. As has already been concluded, such irregularities were intended by Congress to be addressed and corrected by the ICC.

Although the Third Circuit's *G&T Terminal Co.* decision purports to affirm Judge Ackerman, that court disposes of G&T's argument that Conrail violated Section 10505(e) not on preemption grounds but on the merits. In a single paragraph (830 F.2d at 1233), the Third Circuit majority finds, as a matter of law, that Conrail's use of surcharges to offset or deter G&T's loss and damage claims does not violate the Interstate Commerce Act.

For the reasons set forth above, *Amici* Shipper Conferences submit that the courts below erred in holding G&T's common law remedies preempted. That holding appears to leave G&T the avenue of seeking relief before the ICC, though such relief is likely to be more apparent than real. But in approving on the merits Conrail's retaliatory rate surcharges, the Third Circuit is denying G&T even the apparent relief of a Commission proceeding to revoke the exemption. For G&T, or any other shipper threatened with rate surcharges if it files loss and damage claims against an exempt railroad, the Third Circuit offers no relief at all.

To hold, as the Third Circuit does, that an exempt railroad is required by Section 10505(e) to remain liable

for loss or damage to shippers' freight but that it can then turn around and surcharge the shipper for the "cost of processing, defending and paying damage claims" (830 F.2d at 1233) effectively renders Section 10505(e) a dead letter. If the Third Circuit's holding on this point is not reversed, Congress' express preservation of Carmack Amendment liability for exempt railroads will have been written out of the Act. What rational shipper would ever file a loss or damage claim against an exempt railroad, knowing that if he wins, his damages *plus* the railroad's attorneys fees are likely to come out of his own pocket in the form of rate surcharges?[18]

The Third Circuit complains of a lack of authority for the proposition that railroads may not recover their costs, including costs of compensating shippers for loss and damage, in their rates. The likely explanation for the absence of cases on the unlawfulness of the kind of direct chargeback of G&T's damages through G&T's rates that Conrail has undertaken is that for one hundred years railroads were prohibited from discriminating and were subject to regulatory review of their rate increases. In any event, Conrail's practice appears to be legally indistinguishable from the old (and condemned) carrier practice of offering shippers a "choice" of a prohibitively high rate with full carrier liability for loss or damage, or a reasonable rate with limited or no liability. See *Co-operative Shippers Inc.*, *supra*, 613 F.Supp. at 790. See also *Fruitco Corp.* v. *Consolidated Rail Corp.*, 462 NYS 2d 754, 756 (N.Y. Civ. Ct. 1983), in which the court found 49

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[18] It is difficult to understand how the Third Circuit majority can say of G&T's court actions against Conrail for loss and damage that "[r]ecovery in those pending actions, or in any subsequently filed, will not be affected by the tariffs here challenged." (830 F.2d at 1233). The court could not be more wrong.

USC § 10505(e) to have been violated where the carrier refused the shipper's request for rates based on full Carmack Amendment liability, saying such rates would be prohibitively expensive. And while the last sentence of Section 10505(e) permits carriers to negotiate alternatives to full Carmack Amendment liability, such alternatives must be just that: options for a shipper to consider along with full liability. *Id. Accord, Yamazen USA* v. *Chicago and Northwestern Transportation Co.*, 790 F.2d 621, 623 (7th Cir. 1986).[19]

The Third Circuit cites in support of its holding the statement in Section 10505(e) that "[n]othing in this subsection or section 11707. . . shall give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707. . . ." (830 F.2d at 1233). However, G&T has not sought relief on this point from the Commission. It seeks instead to obtain enforcement in the courts of the terms of Section 10505(e).

In providing for exemptions in 49 USC § 10505, Congress included only two express protections for shippers. First, it specified in Section 10505(a)(2)(B) that the Commission may not issue an exemption if regulation is needed "to protect shippers from abuses of market power". Second, it provided in Section 10505(e) that an exempt railroad retains loss and damage liability consistent with 49 USC § 11707. The Third Circuit has now held that the shipper protection Congress mandated in Section 10505(e) may be evaded by the simple device of a rate surcharge to recover, from any shipper filing loss or damage

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[19] See also the Commission's own clarification of carriers' loss and damage liability obligations under Section 10505(e) in the context of exempt trailer on flat car (TOFC) transportation, *Ex Parte No. 230 (Sub-No. 5)*, 46 Fed. Reg. 32257 (June 22, 1981).

claims, the costs of "processing, defending and paying" his claims. Because this holding would render the carrier's historic duty of care a nullity for thousands of shippers (without even the limited recourse of an action at the ICC to revoke the exemption), and because it is inconceivable that this was Congress' intent, the Third Circuit's holding on G&T's Section 10505(e) claims cannot stand.

IV.

CONCLUSION

For the foregoing reasons, *Amici* National Small Shipments Traffic Conference, Inc. and Drug and Toilet Preparation Traffic Conference, Inc. urge this Court to grant G&T's Petition for Writ of Certiorari and to reverse the decision below.

Respectfully submitted,

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